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No. 87-1365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

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I.

INTRODUCTION

Few cases present a clearer question. The administration of criminal justice in the federal courts will be substantially advanced by granting review in this case. The Courts of Appeals for the Second and Fifth Circuits have found the same jury instruction to be prejudicial error.

The Eighth Circuit is troubled by the instruction and assumes some degree of error . . . but finds the application of *Rose v. Clark*, 478 U.S. 570 (1986) to be capable of salvaging the tainted instruction.

The split-in-Circuits as regarding "presumption" instructions merits plenary consideration by the Court particularly in light of the Court's recent statement that such an instruction is violative of the Due Process Clause, *Yates v. Aiken*, ____ U.S. ____, 108 S.Ct. 534, 536 (1988).

1. In *United States v. Golitschek*, 808 F.2d 195 (CA 2, 1986) the Court reversed a series of federal convictions while reviewing a series of jury instructions which included [that] *every person is presumed to know that [which] the law forbids*, (808 F.2d 202).

While reversing the *Golitschek* convictions the Court noted:

> "Whether or not this is so, there is no doubt that he, *like a United States citizen charged with similar offenses occurring wholly in this country, may not be presumed to know the law that establishes the legal requirement that must be known in order to commit the offenses charged*," (808 F.2d at 203; emphasis supplied).[1]

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[1] In *City of Los Angeles v. Heller*, ____ U.S. ____, 106 S.Ct. 1571 (1986) (*per curiam*) the Court noted that the theory under which jury instructions are given by the trial courts and reviewed on appeal is that juries *act in accordance with the instructions given them* (106 S.Ct. at 1573) (Justices Brennan, Marshall and Stevens, dissenting).

Thus, the Court has consistently found, in recent years, that appeals are to be decided on the proposition that juries act in accordance with the instructions given . . . in accord, *Richardson v. Marsh*, 481 U.S. ____, 107 S.Ct. 1702, 1707 (1987); *Greer v. Miller*, 481 U.S. ____, ____, n. 8, 107 S.Ct. 3102, 3109, n. 8 (1987) (Justices Brennan, Marshall and Blackmun, dissenting).

2. The government declines to defend the offending instruction at bar. The government makes no answer whatsoever to the Aiuppa argument presented from pp. 11-16 of his petition.

3. The petitioner has submitted within his petition the proposition that the presumption instruction at bar was constitutionally flawed. Such an instruction is violative of both the Fifth and Sixth Amendments. The instruction itself was [and is] violative to the point where a new trial MUST BE GRANTED.[2]

The petitioner thus submits, that the government, *sub silentio*, agrees that the flawed jury instruction, under the circumstances of this case, is constitutionally defective and a new trial is mandated. Surely if the government could argue to the contrary they would have addressed the proposition as set out in our moving petition at pp. 11-16.

4. The government fails to correctly analyze *Rose v. Clark*, 478 U.S. 570 (1986) as it relates to this case.

In *United States v. Mentz*, 840 F.2d 315 (CA 6, 1988), a divided Court granted a new trial in connection with a federal bank robbery prosecution. Over objection, the trial judge told the jury that certain banks were insured by the FDIC (*Id.* at 318). While reversing the majority reviewed the presumption cases as well as the decisions involving the simplistic proposition that each essential element of the offense had to be . . . found by the jury . . .

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[2] We find it both discomforting and disquieting that the government declines to address recent Circuit cases granting new trials where instructions strikingly similar were found to be prejudicial error; cf., *United States v. Golitschek*, 808 F.2d 195, 202, 203 (CA 2, 1986); *United States v. Davis*, 583 F.2d 190, 193 (CA 5, 1978).

to have been the subject of proof beyond a reasonable doubt.[3]

The Court in *Mentz* interpreted *Rose v. Clark*, as follows:

> "*Rose v. Clark* stands for the proposition that 'when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless.' *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168, 177 (6th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 1610, 94 L.Ed.2d 796 (1987)," (840 F.2d at 324; footnote omitted).

5. The government's observations as relating to this constitutional argument where the petitioner painfully points out that the Second, Fifth and Sixth Circuits took the same instruction and vacated convictions because the instructions were overwhelmingly constitutionally flawed . . . is non-existent. The government does not address these decisions or the constitutional arguments.[4]

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[3] E.g., *In Re Winship*, 397 U.S. 358, 364 (1970); *Francis v. Franklin*, 471 U.S. 307, 309 (1985); and *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979).

The Court noted the Sixth Amendment implications per *Duncan v. Louisiana*, 391 U.S. 145 (1968) and that this was a matter of "federal due process," *Patterson v. New York*, 432 U.S. 197, 210 (1977), cf., *Berrier v. Egeler*, 583 F.2d 515, 521 (CA 6, 1978).

[4] The government, *seriatim*, suggests that the petitioner "acknowledges" the application of *Rose v. Clark* and [the petitioner] does not take issue with the Court of Appeals' analysis of the record (Gov. Brf. at 7).

The government is wrong on both scores; the petitioner has argued the faulty application of *Rose v. Clark* and the fact that in the face of an overwhelmingly flawed instruction *Rose v. Clark* should not apply (there could be no harmless error here).

II.

CONCLUSION

The trial court found that this case involved violations of the gaming regulations in Nevada (Vol. 52, p. 158). The gaming regulations of Nevada covered some thirteen (13) pages of the Court's charge to the jury and the *sine qua non* of the offenses at bar were the Nevada State Gaming Regulations. There was absolutely no proof that the petitioner ever knew they existed let alone knew of their content and the multiple gaming regulation amendments from 1972 through 1978. The presumption instruction allowed the jury to presume that petitioner knew of the intricacies of these state gaming regulations.

The government, has not seen fit to take issue with any of this, rather they seek refuge under the umbrella of harmless error.

In the case at bar the presumption instruction could never rise to the level of harmless error.

Petitioner urges that the writ of certiorari be granted and that he be granted a new trial.[5]

Respectfully submitted,

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[5] The petitioner would ask leave to incorporate-by-reference the arguments submitted in the companion petitions, 87-1409 (LaPietra); 87-1419 (Cerone); 87-1446 (Lombardo); and 87-1573 (Rockman).